Edward C. Verst, Acting Regional Director
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Region 9

Index Nos. on
Robert E. Allen, Associate General Counsel last page.
Division of Advice

Ravenswood Aluminum Corporation
Case 9-CA-28235

This case was submitted for advice as to: (1) whether the Employer engaged in bad faith bargaining; (2) whether the Employer unlawfully implemented its final offer in the absence of a genuine impasse; (3) [*FOIA Exemption 5*]; and (4) whether Section 10(j) relief is warranted.[1]

Background

Ravenswood Aluminum Corporation (the Employer) is an aluminum reduction and fabrication facility located in Ravenswood, West Virginia. The plant was originally owned and operated by Kaiser Aluminum and Chemical Corporation. Since 1958, the United Steelworkers of America, AFL-CIO-CLC (the Union) has been the certified bargaining representative of the production and maintenance employees at the facility, and Kaiser and the Union had always bargained without resorting to the use of strikes or lockouts. In February 1989, Kaiser sold the facility to the Employer, an unrelated corporation. The Employer immediately executed an agreement in which it assumed Kaiser's existing contract (Core Agreement) with the Union. That contract was due to expire on October 31, 1990.

The Ravenswood facility employs approximately 1700 bargaining unit employees and consists of two separate plants. The reduction plant has four potroom lines (two of which were operational at the time of the events herein) in which ore is melted and transformed into aluminum metal. The fabrication plant processes aluminum into finished goods, including cans, rolled sheeting, etc.

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[1] The need for Section 10(j) relief will be discussed in a separate Advice Memorandum.

Kaiser owned the facility for over 30 years and two deaths occurred during that period at the plant. In contrast, during a period of eighteen months under the new Employer, there had been five fatalities, four of which occurred within less than a month during the summer of 1990. One death occurred on June 17 in the potroom when an employee collapsed and died two hours into his second consecutive eight-hour shift.

Before the expiration of the contract, the Employer removed all brush around the plant, installed a security system and barbed wire fence, boarded up windows of various buildings, and constructed steel barriers around the electrical rectifier station and telephone junction boxes. In addition, the inplant guard supervisors applied for permits to carry side arms. On October 31, the Employer brought onto the plant grounds a paramilitary style security force equipped with riot gear and armed with clubs and tear gas.

Prior to July 1990,[2] the Employer, on at least three occasions, requested that the parties begin negotiations early, but the Union declined to do so. In late summer, the Employer began training salaried employees to do bargaining unit jobs and ran advertisements in area newspapers for temporary replacements.

Facts

The parties agreed to begin negotiations on September 25, and they met on that date to establish a bargaining agenda and to exchange proposals. They mutually agreed to defer bargaining on economics until the week prior to the expiration of the contract. Earl Schick represented the Employer as chief negotiator. Schick is employed by a company which supplies labor relations services to the Employer and other aluminum companies, and which has a financial interest in the Employer. The Employer's team also included its President, Don Worlledge, the Industrial Relations Manager, Al Toothman, and several other executives. Joe Chapman, an International Union staff representative, represented the Union as the chief negotiator and spokesperson. Chapman was assisted by a committee composed of five bargaining unit members. In addition, Jim Bowen, the Union's district director, was present at the opening of negotiations and participated regularly after October 30. The parties agreed to negotiate

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[2] All dates hereinafter are in 1990 unless otherwise noted.

in two groups; thus, Team A would handle economic issues while Team B was responsible for other contractual matters.

On September 25, each party made a presentation to stress the issues they considered of major importance. The Employer identified, as its crucial proposals, elimination of the Metal Price Bonus (MPB),[3] suspension (in essence, elimination) of future costs of living adjustments (COLAs) after November 1, containment of both medical benefit expenses and pension costs, and revision of the existing seniority bidding and bumping procedure between the fabrication and reduction facilities. The Employer identified its total hourly employment cost (THEC) as $27.17.[4] The Employer also stated that if it could get an agreement, it was thinking of starting a third potline immediately after October 31. In its presentation, the Union emphasized safety, particularly in the potroom, contracting out, and an increase in the pension multiplier. The Employer acknowledged that safety was an important issue that needed to be addressed by the parties. It also added that the Union should not interpret the Employer's mention of starting the third potline as a bribe. The parties then broke for lunch.

After lunch the parties exchanged proposals. The Union's overall proposal sought changes in approximately 270 items while the Employer presented 25 revisions. The Union's proposal listed 170 changes in the current contract language, other changes in the Core Agreement covering company guarantees in exchange for reduced manning levels, revised procedures for contracting out, and a new apprenticeship agreement. The Union's proposal also requested "a substantial wage increase." The Union reviewed the proposal orally for the Employer's negotiators. The Employer's proposal covered eight non-economic issues: overtime, vacations, manpower utilization, modification of the safety dispute resolution procedure, contracting out, grievance procedure, job combinations or changes, and prohibition of sympathy strikes.[5]

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[3] The Metal Price Bonus (MPB) was a non-guaranteed quarterly cash bonus paid to employees ranging from zero to $2.00 per hour worked and calculated upon the average quarterly cost of raw aluminum product sold on the Midwest Pricing Index.

[4] The parties differed as to the calculation of THEC and apparently used two separate accounting methods to determine the figure. The Employer's accountants used an accrual system including certain projected costs while the Union's computations were based on actual cash costs.

[5] The Employer contends that it made the following proposals that dealt directly with the potrooms: I-B (overtime distribution), III-A (prohibition of bumping between the fabrication and reduction plants), I-A (overtime solicitation), III-B (change of the upgrade practice in

On September 26, the parties met again. The Employer began by asking questions about some of the Union's proposals. According to the Union, when the Employer got to the Union's proposal concerning the restoration of the tapper classification in the potroom, the Employer stated that it would not do anything about the potrooms until after November 1, and that it would accept cooperation from the Union but would not negotiate. The Employer claims that it did negotiate on reinstatement of the tapper classification and was interested in doing so if it did not add to the overall head count in the department. The remainder of the session was spent discussing the Employer's non-economic proposals which had been distributed the previous day.

On October 8, negotiations resumed. The Employer agreed to 55 Union proposals, most of which involved clerical changes reflecting the change of ownership from Kaiser to Ravenswood or rearrangement of the sequence of various pieces of existing contractual language. During the remainder of the session, the Union reviewed various proposals for the Employer. The parties also discussed the question of vacation scheduling. The Employer also identified its senority proposal as a major issue.

On October 9, the parties continued to negotiate vacation scheduling, and made progress.

On October 10, during a morning session, the parties further narrowed their differences on vacation scheduling. The remainder of the session was spent discussing the Employer's proposal on utilization of employees with physical capacity restrictions (P.C.R.). The Employer modified its proposal. During the afternoon session the parties discussed the Union's proposed eleven point overtime agreement. After much discussion the Employer accepted nine of the points.

On October 11, the parties discussed pay for Union representatives, the P.C.R. problem, overtime, and safety issues not related to the potroom.

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filling job vacancies), III-C (forced training), III-D (utilization of employees with physical capacity restrictions), III-H (using any classification to perform any work on down potlines), III-I (proposal to temporarily hire summer help), and IV-A (substitution of a safety professional for the State Safety Representative from the West Virginia Department of Labor). The Union, however, contends that I-A, I-B, III-A, III-B, III-D, III-I, and IV-A were Employer proposals that applied plant-wide. The two proposals that did deal explicitly with the potroom, a portion of III-C and III-H, did not relate in any way to the Union's safety-related manning proposals.

On October 12, the parties discussed overtime and P.C.R. problems.

On October 15, talks began with a discussion of the Union's apprenticeship proposal. The Union then raised its potroom issues.[6] According to the Union, the Employer stated that it had interest in some of the Union's proposals, but did not want to negotiate about them. The Union replied that it wanted to negotiate about the potrooms now given the safety problems and that summer relief was a must. According to the Union, the Employer stated that it did not want to do anything in the potrooms until November 1, and that while it would accept suggestions from the Union, it didn't want to do anything in these negotiations concerning the potrooms. The Employer stated further that it needed the data from the uncompleted heat stress study before it could negotiate. The Union replied that everyone knew the potrooms were hot and dangerous and there had been a death; that was all the information the parties needed to bargain now. To make its point, the Union added a seventh potroom safety proposal: splitting the crane operator/mobile equipment operator into two separate classifications to increase manning levels. [7] The Employer then stated that it would welcome a Union committee to discuss the manning of the potrooms but that it did not want to do anything during these negotiations. The Employer claims that there was a lot of dialogue[8] with the Union committee on why it felt it

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[6] The purpose of the Union's potroom proposals was to reduce the amount of heat stress on individual workers by limiting each person's workload through increasing the number of workers assigned to a given task or limiting the tasks assigned to any given worker. The four core proposals were summer relief for anode setters and butt bath operators for the period May 1 through September 30, the reduction of cell operators' assignments from 42 to 28 pots, reinstatement of the tapper classification, and reinstatement of the spare classification. Two issues of lesser concern were limiting the duties of mobile crane operators and improving crane training by having a trainer present at all times while training was on-going.

[7] The Employer claims that its response to the new proposal was, once again, that it was not its intent in these negotiations to increase the manning requirements in the departments, and that it might consider the Union's proposal if it did not require additions to the head count.

[8] The Employer claims that it had many discussions with the Union regarding potroom proposals but, except for its response on September 26 to the reinstatement of the tapper classification and on October 15 to splitting the crane operator and the M.E.O. job (both mentioned above), it is unclear exactly when the purported discussions occurred. In any event, it is undisputed that the Employer wished to wait until certain time and heat stress studies were completed to discuss restructuring the potroom. In response to the Union's proposal to go from a 42 to 28 pot section, the Employer claims that it communicated to the Union committee that it had been setting production records and could not justify to its

was not necessary to relieve the butt bath operators. Some of the remainder of the October 15 session was spent discussing the Employer's proposals regarding, among other things, upgrades in filling job vacancies, limiting its obligation to train more than one potroom crane operator at a time, working employees out of their classification when a potline was down, the hire of temporary summer help and third party safety professionals, overtime distribution, and paid overtime for after hours safety meetings.

Further, on October 15, the parties discussed the Employer's proposal to prohibit bumping between the fabrication and reduction plants (its plant seniority proposal).[9] The Union claims that Chapman believed that the proposal was sensible and was something that he could ultimately agree on if a way could be worked out to provide guaranteed SUB,[10] regardless of the level of SUB plan funding to employees who would be laid off as a result of this loss of bumping rights between the two plants. Chapman therefore proposed that the Employer provide guaranteed SUB to all employees who would not have been laid off except for the implementation of the proposal. The Employer rejected this request as to all employees, since employees with less than two years' seniority were not eligible for SUB under

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supervisors the need to add two additional cell operators per line per shift. The Employer also claims that it expressed an interest in reinstituting the spare classification, if it would not increase its overall head count. The Employer also claims that it discussed crane training to the satisfaction of both parties during negotiations. Finally, in response to the Union's proposal to restrict potroom employees from going into the rodding department to secure necessary carbon to maintain normal operations, the Employer said it took the position that it had done very well with the present practice and could not justify adding a trucker to the graveyard shift in the rodding department, which the Employer believed the proposal would require, where the trucker would be greatly under utilized. However, the Union, [*FOIA Exemptions 6, 7(c) and (d)*], denied the Employer's version of the content of these discussions. Thus, there are credibility problems which cannot be resolved administratively and are more appropriate to put before an ALJ.

[9] "III. Manpower Utilization

> A. Alter reduction-in-force language to not reduce across plant lines for production employees only.
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> Need to address the problem of manpower movement between Fabrication and Reduction Plants that continually reduces the Potroom labor pool and significantly increases training and other related operational costs. There are a number of ways to impact this situation. One approach to solving the problem would be to allow employees to exercise their seniority and bid jobs in either plant as we do today, but don't allow employees to reduce across plant lines in reduction-in-force."

[10] Supplemental Unemployment Benefits.

the contract in the first instance, but promised to respond to the Union's proposals with respect to employees with more than two years' service.

During negotiations on October 16, the Employer informed the Union that its economic proposal would do away with the MPB. The Employer also stated that the Employer would be offering profit sharing based on 7% of pre-tax profits and a gain sharing plan. An outside attorney employed by the Employer explained the mechanics of the gain sharing plan. The Union raised a number of objections to this plan and informed the Employer that it was not interested in a gain sharing plan. In the afternoon session, the parties discussed the Union's proposal for a vacation bonus.

On October 17, the Employer agreed to the Union's proposals dealing with the rescheduling of vacations, the creation of an arbitration panel of five persons and the identity of those five persons, and the furnishing of written accident reports for employees off on Sickness and Accident Benefits. The parties agreed to examine the Core Agreement to determine appropriate deletions. The Employer ended the meeting by withdrawing proposals dealing with summer hires, probationary period relief, and job combinations or changes.

On October 18, the Union withdrew 30 of its proposals, a number of which would have raised the Employer's costs. The parties made additional progress in resolving their differences on upgrades and streamlining the grievance procedure. The parties also discussed safety clothing.

On October 19, the parties reached agreements concerning the grievance and arbitration procedure, apprenticeship, the right of refusal by assistants on upgrades, casting pants, and removing the ability of the Employer to unilaterally suspend the contractual mechanism relating to an employee's right to refuse dangerous work in certain circumstances. The parties also exchanged further proposals on upgrades.

On October 22, the parties spent the entire morning session on contracting out. The Union carefully went through the history and mechanics of the Union's proposal. The Employer vigorously argued against this language, while the Union emphasized its importance. In the afternoon the Union distributed its initial benefits proposal. The Employer asserted that the Union's proposal would add $1.75 to THEC and that THEC would rise $1.30 over the next three

years even if the parties kept in place the existing benefit programs. The Union disputed the accuracy of the Employer's figures. The parties then went back to discussing the contracting out proposal.

On October 23 or 24, the chief negotiators met privately to discuss the Employer's economic proposal before presenting it to the entire Union negotiating committee. Schick said the proposal was in the ballpark where the Employer wanted to end up. Chapman inquired how many more proposals Schick intended to make, and Schick replied one or two more. Chapman responded that to placate his committee he had inflated the Union's opening economic proposal and that both sides needed to make more proposals. Schick said that he understood. Chapman reminded Schick that the Union's top priorities were safety, pensions, contracting out, and vacation scheduling. Schick then stated he was going to make proposals in blocks, that he would not debate issue by issue, and that he still planned to make only one or two more proposals. Chapman protested that this procedure would make it really difficult to deal with his committee and that he needed movement on individual items to convince his committee to make similar movement. Schick replied that he liked it orderly and wanted packages.

On October 24, the Employer presented its first economic package which encompassed the following 9 points: (1) a 3-year contract term; (2) the elimination of the MPB; (3) freezing of COLA adjustments with the 11/1/90 COLA additive being carried as an additive for the next 3 years; (4) a $.25 per hour wage increase effective 11/1/90; (5) 3 lump-sum payments per employee of $600 after 11/1/90, $400 after 11/1/91, and $400 after 11/1/92; (6) a $1 increase in the pension multiplier for retirements on or after 11/1/90, and a second $1 increase for retirements after 11/1/92; (7) a lump sum of $2,000 for employees retiring between 1/1/92 and 12/31/92 on normal or 62/10 retirements and a lump sum of $3000 for employees retiring between 1/1/93 and 6/20/93 on normal 62/10 retirements; (8) a profit sharing plan exempting the first $25 million of Employer pre-tax profits and paying 7% of profits thereafter; and (9) a gain sharing plan. As in the private meeting, the Employer stated that the proposal was in the ball park of its final offer and that the profit sharing and gain sharing were a critical part of the proposal. He also noted that the final offer might include some non-economic proposals. The Employer stated further that the sub-committee was working on health care problems.

On October 25, the Union rejected the Employer's economic proposal and submitted a counterproposal by reducing a few of its demands involving shoe allowance, overtime lunch pay, vacation hours, and holiday pay rates. The Employer did not immediately counter, and the parties resumed discussion of non-economic items.

On October 26, the B Team met and negotiated further on the non-economic issues of general safety, modification of the Core Agreement, and forced overtime. The parties reached agreement on new contractual language furnishing the Union co-chair of the Safety and Health Committee with copies of all technical and advisory data pertaining to environmental issues at the plant. On this date, the Employer also responded to the Union's October 15 proposal concerning plant seniority and guaranteed SUB. The Employer proposed that during the first two years of the contract it would extend the guaranteed SUB available to all employees with more than ten years' seniority to any employee with between two and ten years' seniority who is laid off because of the elimination of bumping rights. The Union rejected this proposal and countered by proposing that this guarantee apply during the entire length of the three-year contract being proposed by the Company. The Employer rejected this proposal.

On October 27, the B Team continued negotiations on non-economics with discussions centering on forced overtime and seniority concerning P.C.R. employees.

On October 28, negotiations continued with the B Team discussing the apprenticeship program. Later in the session, the Union assertedly raised the potroom issues, but the Employer responded that it would welcome the Union's participation on "restricting" the jobs after the parties had a contract. The Union then requested that the Employer supply various items of information relevant to potroom bargaining including butt bath disposal, setting carbon by quarters, carbon setting on different shifts, metal transport from potrooms to casting, bath tapping, dead work, summer vs. winter help, and the number of potroom supervisors. Although the Employer promised to provide this information, it has never done so.

On October 29, the B team continued non-economic negotiations by discussing apprenticeship, overtime, P.C.R.'s and bumping reductions in force. The Union reviewed its remaining non-economic proposals. When the Union again raised the issue of "restricting" the potroom jobs, the Employer said it simply could not address the

issue, but that it would welcome the Union's involvement later.

Prior to presenting its second economic proposal, the chief negotiators met privately. According to the Employer, the meeting took place on October 28 or 29, but the Union claims that it occurred on October 30. In any event, the Employer explained why it felt the MPB did not make sense at Ravenswood and then distributed its second offer. The Union protested that there was not much movement and again expressed a need for negotiations on specific issues rather than submission of packages. The Employer allegedly replied that it was not going to play games.

On October 30, at 11:15 a.m., the Employer presented its second economic offer. Again the Employer proposed a 3-year contract, elimination of the MPB, suspension of COLA, a wage increase of 25 cents, and a $1.00 pension multiplier increase. The proposal for annual lump sum bonuses was increased to $1,700 ($800, $450, and $450). Lump sum payments of $2,000 for employees retiring between 1/1/92 and 12/31/92 and $3,000 for employees retiring between 1/1/93 and 9/30/93 were proposed. The profit sharing proposal was altered by adding a guarantee to pay 50 cents per hour worked regardless of the Employer's profitability and if the Employer experienced a net loss, payment would be deferred until the next profitable year. The gain sharing proposal was eliminated. Finally, the Employer proposed guaranteed SUB benefits for employees with 2 to 10 years seniority if laid off within the first 2 years of the contract. This latter proposal was contingent upon the Union's acceptance of the Employer's seniority proposal. The offer also required acceptance of the bargaining subcommittee's benefits negotiations. Negotiations recessed at noon for the Union to caucus and draft a second counterproposal.

On October 30 at 4:00 p.m., the Union made its first economic counterproposal. The Union's proposal included: a 33 month contract (a move from 17 months); reduction or withdrawal of minor economic demands; 2 annual increases of 50 cents per hour; retaining MPB; and increasing COLA payments by eliminating the 3% quarterly threshold and rolling in COLA rather than treating it as a wage additive. The Union asked the Employer to respond on the issues by letting the Union know if the parties could agree on anything, or at least to identify any problems and explain what modifications were needed to make a proposed item acceptable. The Employer simply said it could not afford the Union's proposal and claimed that it was not a serious offer. The Employer's chief negotiator then left the room.

At 4:20 p.m., the B Team met; the Union withdrew 8 economic and noneconomic subjects, and reached agreement on others.

Before 9 a.m. on October 31, Chapman, Bowen, Schick, and Worlledge met privately for 15 to 20 minutes. Bowen castigated the Employer for its bargaining stance and stated that the Union wanted to negotiate. Bowen stated that there was no way the committee could buy into the profit sharing plan and give up the MPB. He added that the Employer should take its proposal to eliminate COLA off the table. Chapman noted that the Union could be flexible and offered to make another proposal. He stated that he was going to send an International staff member to the Employer with some ideas for profit sharing. He suggested running profit sharing and MPB concurrently with payment of the greater amount. Schick merely responded that the Employer was a "stand alone" company without deep pockets. Bowen concedes that at this meeting he stated the parties . . . were pretty far apart and I doubted that we could get there unless we get moving . . . .

Later that morning at a side bar meeting, the Union presented a written proposal requiring either MPB or profit sharing using language from its contract with USX, whichever was higher. The proposal was geared to show the Employer that the Union was willing to consider profit sharing if the parties could work out a system of decent guarantees. The Employer gave no sign of interest and failed to either make a counteroffer or request that the Union make a new proposal.

At 3:30 p.m. that afternoon, the Union made an offer although it was the Employer's turn to make a proposal. The Union's proposal contained concessions: complete withdrawal of the October 30 demand for a substantial increase in the COLA yield, and reduction in the pension multiplier from $10 to $7. The Union stood firm on the annual 50 cent per hour wage increase, but withdrew or modified proposals relating to overtime payments and benefits. After presenting the proposal, the Union criticized the Employer for seeking to cut the membership's paychecks despite the fact that it was making money and stated that in asking the Union to give up the MPB for the profit sharing plan, the Employer was asking it to buy a "pig in a poke". The Union further pointed out that even with COLA and the MPB, the employees' incomes had only just reached the 1983 preconcession levels, and that those concessions had been the key to the Employer's profitability. It then stated that the Employer's bargaining strategy made no sense, and that it was acting as if it wanted the Union to strike. The Employer merely

responded that it did not want the MPB and that the Union's offer did not make sufficient movement. After a brief exchange between the parties, the Employer said it did not want a debate and left the room without rejecting the Union's proposal. At 3:55, after only 25 minutes, the meeting adjourned.

On October 31 at 6:00 p.m., some of the negotiators met privately but have different versions of what took place. The Union claims that after picketing was discussed (the Union explained that employees were only attempting to locate potential picket sites), the Employer reviewed its final offer in detail. The Union then responded that the Employer should stop talking packages and get down to issues and that there were things that the Union could do. The Union stated that a proposed 35 cent hourly increase would "probably fly." Chapman suggested applying the lump sum money to the pension multiplier. He also suggested that to solve the unpredictability problem of MPB and COLA, the parties could agree to raise the threshold or to cap payouts. Another possible compromise was to pay the higher of profit sharing or MPB, or alternatively to run both simultaneously with MPB being phased out over time. Bowen also suggested that the COLA consist of the lower paying Basic Steel IRP.[11] The Employer responded that it was not interested and did not discuss any of the suggestions ("I'm not going to play those games").

The Employer has a different version of the meeting. After the Union explained about the pickets, the Employer advised that it would soon make a final offer and asked where the Union stood. The Employer admits that the Union asked about a cap for the MPB, which the Employer rejected. The Employer claims the Union stated that it might give up COLA or MPB but not both. The Employer responded that both were needed. According to the Employer, the Union also indicated concern over an annual rather than quarterly payment in profit sharing. The Employer claims that it did not detail its final offer and that the Union made no substantive suggestions.

At some time on October 31, the Union withdrew noneconomic issues regarding the recapture on lost bargaining unit work. Also at some time on October 31,[12] at

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[11] IRP includes a less generous COLA formula, less frequent payment dates and a provision allowing stock rather than cash payments in certain circumstances.

[12] Chapman and the Employer place this discussion sometime after October 26, probably October 30. Bowen, who did not meet with the Employer until October 31, remembers the discussion taking place on October 31.

a private meeting, the Union contends that it proposed accepting the Employer's plant seniority proposal if the Employer rehired a Union employee.[13] However, the Employer claims that the Union merely asked if the employee would be hired in order to reach agreement.

When negotiations resumed later that evening, the Union withdrew about 15 proposals pertaining to departmental issues. The Union claims that the parties next met at 9:00 p.m. for presentation of the Employer's final proposal.[14] The Employer's final offer was as follows: (1) raised its wage offer from 25 cents to 35 cents; (2) extended its 11/1/92 $1 increase in the pension multiplier to all retirements after 11/1/90 rather than to only those occurring after 11/1/92; (3) increased profit sharing from 7% to 9% of all profits in excess of $25 million with a 50-cent hourly guarantee to be paid quarterly for the first year; and (4) increased the lump-sum payments. Retirement amounts were liberalized and the SUB benefits proposal was retained. The Employer insisted on acceptance of its benefits proposal, seniority plan, and the elimination of sympathy strikes or related activities. The offer remained open for acceptance until November 3. The talks recessed at 9:15 p.m. for a Union caucus and resumed at 10:35 p.m. At that time the Union rejected the offer and gave the Employer a letter, which the Union read aloud, offering to work under the expired contract while continuing negotiations. It also offered to give the Employer 48 hours notice of its intent to strike, during which time the parties would meet to provide for an orderly and safe plant shutdown.[15] At 10:45 p.m. the Employer left the room to caucus and returned at 11:54 p.m. At 11:55 p.m. the Employer announced that it rejected the Union's offer to keep working and stated that the parties were at impasse. The Union denied impasse and stated that it wanted to continue to work and to negotiate. The Employer left the room. The Union negotiators remained

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[13] Prior to negotiations, Chapman and Toothman discussed reinstatement of this employee as something that would aid the parties in reaching agreement.

[14] The Employer claims, however, that Schick met privately with Bowen sometime prior to this meeting. At that time, Bowen allegedly stated that he did not feel they could put an agreement together and that the parties were too far apart. Schick then advised Bowen that the Employer was going to make a final offer and detailed the proposal. Bowen simply told Schick to present it if he (Schick) wanted to. Bowen denies that this meeting or any such discussion took place.

[15] The Union had made an identical offer to Kaiser during the parties' national negotiations covering Ravenswood in 1988, and Kaiser had accepted. The parties were able to negotiate for an additional twenty days and reached a new contract without the necessity of a strike or lockout.

in the room until 12:15 a.m. or 12:20 a.m., waiting for the Employer to return.

The Employer had previously instructed all employees by written memorandum on October 29 to remove personal effects from their lockers by midnight of October 31 in the event that no agreement was reached. On October 31, the Employer brought replacement workers and the "paramilitary style" security force into the plant grounds. Although the third shift reported to work on October 31, they were sent home at midnight and immediately replaced. The Union began picketing with signs stating "Locked Out" and "RAC Unfair."[16]

On November 3, the Union renewed its offer to the Employer to continue working under the terms of the expired contract while negotiations continued. The Employer rejected the offer by letter dated November 4.

The Employer sent a letter dated November 13 renewing its final offer, with the modification of requiring employees to work 750 hours to be eligible to collect lump sum payments. The offer remained open until November 15.

On November 14, the Union agreed to meet with a federal mediator on November 15. The Union also received the Employer's November 13 letter.

On November 15, the parties met with the federal mediator. The Union rejected the Employer's offer without making a counteroffer but proposed to provide a response at the parties' next meeting on November 28. Before that date, however, the Employer sent the Union a letter dated November 19, which advised that the parties were at impasse and that effective November 29, it would implement its final offer as modified on November 13. The letter also indicated that work would be available on November 29 for unit employees who wished to return to work under the terms of the implemented offer, provided that a request to return was made no later than November 26. The November 19 letter may have gone to all employees as well.

On November 28, the parties met again with the federal mediator. The Union counterproposed the following: (1) retention of its proposal for a 33 month contract; (2) retention of COLA; (3) keeping the MPB or recouping the 1983 wage concession ($1.34 hourly increase); (4) withdrew 50-

[16] The Region has determined that the Employer's conduct on October 31 constitutes a lockout.

cent hourly increase in the second year; (5) reduced pension multiplier increase from immediate $7 to 3 annual increases totaling $5 ($2, $1, $2); (6) withdrew 4 of the 7 potroom proposals; (7) withdrew the 15-page contracting-out proposal; and (8) withdrew other items related to benefits and vacation pay.

After presenting its counteroffer, the Union denied that the parties were ever at impasse. The Employer agreed to review the offer but noted that the parties were still "miles apart," adding that the Employer did not use the term "final offer" lightly. After 45 minutes the Employer returned and stated that it was rejecting the Union's offer completely. Despite the Union's request, the Employer declined to respond item by item or to make a counterproposal. The Employer stated further that the parties were still miles apart. Following the session, the mediator asked the Employer what would happen if the Union moved on two major issues. The Employer responded that there were more than two issues. The mediator then canceled the session set for the next day. Negotiations adjourned.

At some point during negotiations on November 28, the Union requested copies of all heat stress and related potroom studies conducted by the Employer. The Union renewed its request by letter dated December 3. The Employer replied by letter dated December 14, noting that the only study conducted concerning the potrooms was the heat stress study which was not yet completed. By letter dated January 8, 1991, the Union also requested the "Ogle" report which assessed safety measures and the Employer's workplace environment. By letter dated January 18, the Employer responded that neither report had been completed. He then proposed as a precondition to disclosure that the Union agree to keep the reports confidential and not attempt to introduce the reports in any legal proceeding (including arbitration) without the Employer's express consent. The parties continued to exchange correspondence concerning the requested informaton with the Union objecting to the Employer's preconditions and the latter eventually modifying its position. The Employer finally furnished one of the requested reports by letter dated April 30 after the parties reached agreement with respect to the Employer's confidentiality concerns.[17]

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[17] The Region has determined to issue complaint, absent settlement, with respect to the Employer's failure to promptly furnish this requested information. It is unclear whether the October 28 oral request for information on potroom operations is included in the complaint allegation.

On December 3, the Employer sent the Union a letter dated November 29 to inform the Union that it had unilaterally implemented its final offer and that, as of December 3, the temporary replacements were converted to permanent replacements.

ACTION

We conclude that: (1) the Employer failed to bargain in good faith before both the lockout and the implementation of its final offer; (2) no valid impasse was reached in negotiations; and (3) the locked out employees are entitled to reinstatement and backpay as of November 1.[18]

1. Failure to Meet the Good Faith Obligation of Section 8(d)

We conclude that the Employer's Section 8(a)(5) violation during negotiations is established by the following indicia: (1) refusal to negotiate about manning and safety in the potroom; (2) insistence on bargaining about economics in packages while severely limiting the total number of proposals to two or three; and (3) declaring impasse when none existed.

Section 8(d) defines the duty to bargain as the mutual obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, in the negotiation of an agreement." Although it is not illegal for a party to engage in hard bargaining, the Act does require the parties to bargain in good faith, i.e., with a willingness to enter into a contract.[19] Such obligation "does not compel either party to agree to a proposal or require the making of a concession," but the employer is, nonetheless, "obliged to make some reasonable effort in some direction to compose his differences with the union . . ."[20] Thus, the duty to bargain requires "more than a willingness to enter upon a

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[18] [*FOIA Exemption 5*

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[19] NLRB v. Insurance Agents Union (Prudential Insurance), 361 U.S. 477, 485 (1960).

[20] Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984). See also Hudson Chemical Co., 258 NLRB 152, 155 (1981).

sterile discussion of union-management differences." NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952).

A bargaining posture which is calculated to insure that bargaining will be futile is inconsistent with good faith bargaining.[21] Accordingly, it is necessary to scrutinize a party's overall conduct to determine whether it has bargained in good faith, or whether it is endeavoring to frustrate the possibility of arriving at any agreement.[22] The presence or absence of the intent to find a basis for agreement required by the duty to bargain in good faith set out in Section 8(a)(5) and 8(d) of the Act "must be discerned from the record."[23]

a. Refusal to Discuss Manning and Safety in Relation to the Potroom.

By applying the above principles to the instant case, we conclude that the Employer failed to meet its Section 8(d) obligation to bargain in good faith by refusing to discuss the Union's proposals concerning manning and safety in the potroom. Manning and workload levels are mandatory subjects of bargaining under the Act, Bonham Cotton Mills, 121 NLRB 1235 (1958), enf'd 289 F.2d 903 (5th Cir. 1961), as are workplace health and safety, Minnesota Mining & Manufacturing Company, 261 NLRB 27 (1982). Indeed, as the Board recognized in the latter case, "few matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well being, or their very lives." 261 NLRB at 29. In the instant case, although the Union repeatedly requested to negotiate about its safety related manning proposals, the Employer consistently refused to discuss those issues during contract negotiations.

The Employer gave several explanations which are variations of the same theme: not now, after negotiations.

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[21] NLRB v. Herman Sausage Co., 275 F.2d 229, rehearing denied 277 F.2d 793 (5th Cir. 1960). See also Columbia Records Division of CBS, 207 NLRB 993, 1001 (1973), where, in finding good faith bargaining over the employer's decision to close a facility, the Board stated that "the statutory standard thus adopted contemplates a willingness to enter into discussion with an open mind and a sincere intention to reach an agreement consistent with the respective rights of the parties."

[22] Atlanta Hilton and Tower, supra.

[23] General Electric Co., 150 NLRB 192, 194 (1964), enf'd. 418 F.2d 736 (2nd Cir. 1969), cert. denied 397 U.S. 965 (1970).

Briefly, the Union claims that when it raised its potroom proposals, the Employer responded as follows:

> 1. On September 26, the Employer advised the Union that the Employer did not want to discuss the potrooms until after November 1. The Employer also stated that it would accept cooperation from the Union in improving the area but did not want to handle the matter during negotiations.
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> 2. On October 15, the Employer stated that the bargaining should be delayed. It noted that the Union's suggestions would be welcomed and suggested the formation of a committee to discuss manning needs. Another Employer representative noted that heat and safety studies had been commissioned but the results were not yet available. The Employer also suggested that there was insufficient data to negotiate.
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> 3. On October 28, when the potroom issues were raised, the Employer stated that it would welcome the Union's participation of restructuring the jobs after the parties had a contract.

4. On October 29, in reference to restructuring the potroom jobs, the Employer said it simply could not address the issue.

The above statements establish the Employer's unlawful refusal to bargain with the Union over the mandatory subjects of safety and manning with respect to the potroom.

The harm caused by the Employer's refusal to discuss the Union's proposals of manning and safety in the potroom is not only an independent Section 8(a)(5) violation, but is also evidence of an attitude inconsistent with good faith bargaining. In Kroger Co.,[24] the employer failed to bargain in good faith about its savings and profit-sharing plan because it "refused to discuss with any of the union representatives, and therefore literally refused to bargain about, either the possibility of viewing its Retirement Plan and Savings and Profit-Sharing Plan as separate negotiable conditions of employment, or the possibility of altering its profit-sharing plan for union represented employees, or substituting some other benefit in its place." Rejecting the employer's defense that altering the plan would be impossible, the ALJ stated:

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[24] 164 NLRB 362 (1967), enf'd. 69 LRRM 2425 (6th Cir. 1968).

> ...[T]he mere fact such a solution would be quite unworkable and impractical is not sufficient reason for precluding any consideration of all other possible adjustments. The fact is the parties never reached the question of how the Unions' demands to discuss the benefits enjoyed by the employees could be dealt with in view of the changes made in retirement systems. It is the fact that all talk was excluded from the negotiations that governs here, not the perhaps illogical idea of separate and maybe multiform profit-sharing systems. 164 NLRB at 376.

In enforcing the Board's order, the Sixth Circuit stated that, among other things, "the attitude of the company's negotiators demonstrate that the savings and profit-sharing plan of Kroger was "out of bounds" and beyond the authority of the Company's negotiators for discussion at the bargaining table...It is obvious from the evidence that union negotiators were given to understand at the outset that that was a subject which could not be the subject of negotiation. Such an attitude is inconsistent with good faith bargaining. (Citation omitted.)" 69 LRRM at 2429.

In light of Kroger, it is clear that the Employer's conduct goes beyond refusing to bargain about mandatory subjects, and operates to taint the Employer's good faith during contract negotiations. The Employer's comments regarding the Union's potroom proposals establish its lack of good faith, especially when set against the backdrop of the death in the potroom. Given the known concern of the employees about the recent deaths, the Union could not have been expected to enter an agreement, even if it had been willing to assent to the Employer's other demands, if its potroom proposals concerning safety and manning were not addressed.[25] Such refusal, especially in conjunction with the Employer's limitations on economic bargaining, as discussed below, amounts to conduct designed to avoid reaching an agreement with the Union in violation of Section 8(a)(5).

b. Limiting Bargaining About Economics to 2 or 3 Package Proposals.

Initially, we note that there is no evidence that the Employer engaged in improper conduct away from the

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[25] See, e.g., Hamilton Standard Division of United Technologies Corp. 296 NLRB No. 79, slip op. at 4 (1989).

bargaining table.[26] In addition, the Employer gradually improved upon, instead of remaining fixed upon, its initial proposals.[27] Indeed, the Employer and Union negotiators reached tentative agreements on approximately 100 proposals.

Nevertheless, the evidence is sufficient to infer that the Employer failed to bargain in good faith. In Eastern Maine Medical Center, 253 NLRB 224, 238 (1980), 658 F.2d 1 (1st Cir. 1981), an employer's:

> . . .economic proposal was explicitly conditioned upon acceptance of [its] non-economic proposal and acceptance of its economic proposal as a package . . . [this] meant at the very least that there could be no tentative agreements on individual economic issues. Indeed, there were none, unlike on non-economic issues where there were numerous tentative agreements reached.

Admittedly, in the instant case, the Employer did not condition bargaining of economics on reaching agreement on the non-economics. But the violation in Eastern Maine extended beyond the conditional bargaining. As the First Circuit held in enforcing the Board's order,

> The ALJ was also warranted in finding that, in these circumstances, the tendency of conditional bargaining to foreclose meaningful negotiations was exacerbated by EMMC's insistence that its economic proposal be accepted "as a package." As explained by [the respondent's] chief negotiator, this meant that: "[Y]ou could not accept one portion of the economic proposal and say its okay and say it is tentatively agreed. It is not on the table on that basis. In order to get tentative agreement under [the] economic proposal, the proposal had to be accepted as a package." Though this tactic, standing alone, may be unobjectionable, the ALJ supportably concluded that: "[I]n composite, these positions taken by Respondent, narrowed the bargainable issues to such an extent that bargaining on economic matters was virtually non-existent." 658 F.2d at 12. (Emphasis added.)

In short, the Board and Court found that package bargaining, where coupled with other indicia, will violate the Act because they operate in tandem to frustrate bargaining. In the instant case, the other indicia are the

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[26] See Atlanta Hilton, supra.

[27] See The Peelle Co., 289 NLRB 113, 120-121 (1988).

Employer's insistence at the outset of bargaining on economics that it would make only "one or two more" package proposals; refusing to negotiate regarding safety and manning in the potroom, as discussed above; and failing to acknowledge its duty to continue bargaining, even by exchanging more package proposals, by declaring impasse when none existed.[28]

As noted above, on October 24, the Employer informed the Union during a private meeting that it would make only "one or two more" package proposals. The Union responded that it would need more proposals and more discussions of individual issues to settle a contract. The Employer offered no explanation for its insistence on negotiating only in packages and in making no more than two additional offers other than that Schick liked to keep things orderly. Moreover, after presenting its economic proposal on October 30, the Union requested that the Employer respond by informing the Union if the Employer could agree to any particular item, at least identify any problems, and explain what modifications were needed to make a proposal item acceptable to the Employer. The Employer failed to do so, quickly leaving the room after rejecting the Union's total economic proposal as too expensive.[29] It is also noteworthy that the Union never acquiesced to the Employer's manner in negotiating economics, as evidenced by its request to discuss the individual issues and by its request for more proposals. See Eastern Maine, 658 F.2d at 12, n. 10. The fact that the Union also summarily rejected the Employer's economic proposals is irrelevant; the Employer had initiated bargaining in this manner, and the Employer never requested that the Union explain the reasons for rejecting Employer offers that arguably were responsive to Union concerns.

In light of the above-mentioned conduct, the totality of the Employer's conduct goes beyond hard bargaining; it shows a calculated attempt to frustrate efforts to reach agreement. The Employer took a position on the Union's potroom proposals from the second day of the kickoff sessions which, in addition to being an 8(a)(5) violation,

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[28] Although the impasse issue will be discussed in more detail below, briefly, a good faith impasse was impossible on October 31 because the parties had spent so little time negotiating on complex economic issues (after the exchange of initial economic packages the parties only spent approximately two hours actually negotiating economics), the parties continued to make movement, and the Union offered to continue working under the expired contract and to provide the Employer with 48 hours written notice of its intent to strike.

[29] This conduct was repeated on November 28 during negotiations when the Employer again refused to respond to each item in Union's proposal or make any kind of counteroffer.

it must have known would be totally unacceptable to the Union in light of the recent surge of deaths under the new ownership. Moreover, the Employer bargained on economics in a very limited manner with its preset limits on the number of package proposals, and declared impasse where none was possible to prematurely curtail bargaining. Therefore, based on the totality of the Employer's conduct, we conclude that it failed to meet its Section 8(a)(5) obligations to bargain in good faith.

Consequently, since the Employer's November 1 lockout of its employees was in furtherance of a bad faith bargaining position, as discussed more fully below, it was in violation of Section 8(a)(3) and (5).[30] And, since no impasse will be found in the presence of unfair labor practices,[31] the Employer was not privileged to implement its November 13 proposal and such action also violated Section 8(a)(5).[32]

2. Prematurely Declaring Impasse on October 31 and November 29, 1990.

An impasse occurs "after good faith negotiations have exhausted the prospects of concluding an agreement." [33] To have an impasse the parties must have reached "that point . . . in negotiations when the parties are warranted in assuming that further bargaining would be futile."[34] "An impasse required a deadlock, and for such a deadlock to occur, `neither party must be willing to compromise.'"[35] The existence of impasse is a factual determination that depends upon a variety of factors, including the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or

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[30] Association of D.C. Liquor Wholesalers, 292 NLRB No. 132, slip op. 8-9 (February 21, 1984), enf'd 136 LRRM 2329 (D.C. Cir. 1991).

[31] See, e.g., Dahl Fish Co., 279 NLRB 1084, fn. 3 (1986), enf'd 125 LRRM 3063 (D.C. Cir. 1987), (failure to provide information necessary for negotiations).

[32] Although the Board has held in cases such as Litton Microwave Cooking Products, 300 NLRB No. 37 (1990), that an employer's Section 8(a)(5) violations, such as unilateral changes, does not necessarily establish bad faith during contract negotiations, such cases are not applicable here. The Employer's Section 8(a)(5) violation involves its conduct during ongoing contract negotiations, not conduct unrelated to negotiations as in Litton.

[33] Taft Broadcasting Company, 163 NLRB 475, 478 (1967), enf'd sub nom. Television Artists, AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

[34] PRC Recording Company, 280 NLRB 615, 635 (1986), enf'd 836 F.2d 289 (7th Cir. 1987).

[35] NLRB v. Powell Electric Manufacturing Company, 906 F.2d 1007 at 1011-12 (5th Cir. 1990, citation omitted), enfg. in rel part, Powell Electrical Manufacturing Company, 287 NLRB 969 (1987).

issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Taft, 163 NLRB at 478.

In PRC Recording Company,[36] the Board recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception. However, in determining the existence of impasse it is important whether the parties continue to meet and negotiate. Where movement between the parties indeed occurs, the Board does not confine its examination of bargaining history solely to the item claimed to be at impasse.[37] Rather, in recognition of the "normal give and take that occurs when bargaining for a new contract," a union proposal which compromises on a major issue will defeat a finding of impasse even where it fails to move on the subject as to which impasse is claimed by the employer since "bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas."[38] And, indeed, the result could not be otherwise since ". . . the statutory purpose would be frustrated if the parties were permitted, or indeed required to engage in piecemeal negotiations."[39] This rule is amplified by the further understanding that a ". . . party is not justified in concluding that negotiations are at impasse simply because concessions have not been made in the area it finds most crucial or the concessions themselves have not been sufficiently generous."[40] And where the parties indicate flexibility in private meetings between chief negotiators, the Board disregards adamant public statements at the bargaining table.[41]

The greater the number of bargaining sessions on the subject claimed to be at impasse, the greater the chance that an impasse exists.[42] On the other hand, impasse may be reached even after a few bargaining sessions where the subject of the change, e.g., wages, was of "supreme

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[36] 280 NLRB at 635

[37] See Sacramento Union, 291 NLRB 552 (1988).

[38] Id. at 556 (citation and footnote omitted).

[39] Id.

[40] Old Man's Home of Philadelphia, 265 NLRB 1632, 1634 (1982), enf. den. 719 F.2d 683, 688 (3rd. Cir. 1987). (The Third Circuit explicitly endorsed this principle but disagreed with the Board that the making at the table of an offer previously made in a private meeting constituted a new proposal.)

[41] Association of D.C. Liquor Wholesalers, 292 NLRB No. 132, slip op at 8-9.

[42] 280 NLRB at 635.

importance" to the employer with respect to its ability to compete.[43] In WPIX,[44] the Board found no impasse in circumstances where the employer waited until the eleventh bargaining session to introduce its final contract proposal, the parties met only three additional times to discuss the new proposal and made progress at each meeting in narrowing their differences, bargained about wages at only two of the sessions, and the union, but not the employer, stated its willingness to negotiate further. In such circumstances, "the fact that the parties were not close on many issues does not indicate that the negotiations were deadlocked: it shows that the parties still had many hours of bargaining before them in order to resolve their differences."[45]

No impasse will be found where a union negotiator, while indicating that the parties are apart, decides to continue bargaining and solicits the assistance of a mediator.[46] And where the mediator had arranged further bargaining sessions, an identical conclusion is warranted.[47] The same result follows where a union, while claiming the parties remain far apart, offers to remain at work under the existing terms and conditions of employment while negotiations continue.[48]

The fact that a party claims to be at impasse is not determinative since "bargaining devices or scare words such as 'impasse' or 'deadlock' used by the parties are legal conclusions not binding on the Board."[49] By contrast, since impasse turns on the mental state of the parties, a highly subjective inquiry, the Board deems persuasive a claim by a party, when confronted with the other party's assertion of an impasse, that it does not consider itself to be at impasse or that it wants to bargain further. [50] Likewise, impasse will not be found where the parties have managed to reach agreements on other issues. [51]

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[43] Bell Transit Co., 271 NLRB 1272 (1984).
[44] WPIX,Inc., 293 NLRB No. 2 (February 28, 1989), enf'd 906 F.2d 898 (2nd Cir. 1990).
[45] Id. at 32-33; Powell Electrical Manufacturing Company, 287 NLRB at 974.
[46] Powell Electrical 287 NLRB at 969.
[47] Id.
[48] Association of D.C. Liquor Wholesalers, 292 NLRB 132, slip op. at 9-10.
[49] PRC Recording Company, 280 NLRB at 635.
[50] Association of D.C. Liquor Wholesalers, supra at 4; Powell Electrical Manufacturing Company, 280 NLRB at 969.
[51] Sacramento Union, supra.

The Employer claims impasse because the parties were deadlocked on major issues (the elimination of the MPB, suspension of COLA, wages, the extent of increase in the pension multiplier, the duration of the proposed agreement, and revision of the existing plant seniority and bumping procedure). Based on the above principles, we conclude that the parties were not at impasse on October 31.

First, we considered that the length of the negotiations, a factor under the Taft test, was very brief considering the complexity of the economic issues involved. Although the parties negotiated for 22 days, economics were discussed on only 4 days. In fact, when the parties began serious negotiations on October 30 and 31, the meetings lasted for 65 minutes and 53 minutes, respectively. Therefore, the parties spent less than two hours negotiating economics after their initial exchange of proposals. [52]

Second, we considered the movement made by the parties. As of October 31, the Employer had made only three proposals. Those offers showed movement in the Union's direction and the Union had revised its position on several fronts, e.g., contract duration, profit sharing as an alternative to MPB, reduction in COLA and pension costs, to encourage the Employer's efforts. Moreover, away from the bargaining table, the Union had indicated agreement with the Employer's wage proposal and offered other alternatives designed to address the Employer's objections to retention of the MPB and COLA. The Employer refused to explore those proposals and thus stymied further efforts at bargaining. [53]

Third, we considered the contemporaneous understanding of the parties regarding the status of bargaining, another Taft factor. When the Employer declared impasse on October 31, the Union denied it. Moreover, the Union offered to continue working under the terms of the expired agreement while the parties continued to negotiate and to give 48 hours notice of its intent to strike. See WPIX, supra; Association of D.C. Liquor Wholesalers, supra. However, the Employer rejected the Union's offer, which relates to our fourth Taft factor, the bargaining history of the parties.

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[52] The Employer contends that the parties had approximately 15 hours of face-to-face discussions on economic issues from September 25 to October 31 with approximately 8.5 to 9 of these hours occurring from October 22 through October 31 but it is unclear how the Employer calculated these figures, unless it included the time the subcommittee on benefits met.

[53] Lapham-Hickey Steel Corporation, 294 NLRB No. 27 (May 31, 1989) (No genuine impasse was reached where the employer unilaterally declared impasse after rejection of its final offer without exploring the union's proposal to discuss potential tradeoffs for a wage increase).

Although these are the first contract negotiations with the Employer, the Union had long engaged in collective bargaining for these employees many times and never resorted to a strike during negotiations. Also, in the 1988 negotiations, the Union had made the same offer to the former employer (Kaiser) to continue working under the expired contract and to give 48 hours notice of its intent to strike, and Kaiser accepted. Thus, it is relevant that the Employer did not accept the Union's offer, especially in light of the fact that the Employer spent a great deal of time and money in preparation for a strike, when there was no past history of this Union striking during negotiations for these employees. Moreover, the Employer's contention that it was privileged to reject the Union's offer out of hand, because it is not possible to shut down the potlines with only two days notice without incurring significant expense in replacing damaged equipment, is without merit. In this regard, the Employer made no counteroffer which would have required a sufficient amount of time to shut down the potlines safely subsequent to any notice of an intent to strike. Indeed, the Employer did not articulate this concern in rejecting the Union's offer. Further, even a 48-hour notice was unnecessary to prevent disruption of the potlines inasmuch as the Employer intended from the beginning of negotiations to continue production without interruption, and was able to have the replacements and supervisors in place immediately when it sent the third-shift employees home on October 31.

Fifth, we considered the importance of the issues as to which there is disagreement. The Employer contends that the parties were at impasse regarding its plant seniority provision, which it presented as its most important noneconomic item, because the Union gave no indication that it would agree to any change in plant seniority. The Union does not dispute that the Employer stated that this was a key item on September 25 and October 15. Further, the Union states that the proposal was raised three times at the negotiating table and once in a sidebar conversation with Schick.[54]

As stated above, the Union claims that on October 15, the first time the proposal was discussed in detail, the Union proposed that the Employer provide guaranteed SUB to all employees who would not have been laid off except for the implementation of the plant seniority provision. Although the Employer rejected the Union's proposal with

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[54] The Employer, however, claims that plant seniority was discussed on September 25, October 8, 15, 19, 26 and 30.

respect to employees with less than two year's seniority, it promised to get back to the Union with respect to employees with more than two years of seniority. Then, on October 26, the Employer proposed extending the guaranteed SUB to all employees with more than ten years seniority who are laid off because of the elimination of the bumping rights during the first two years of the contract. The Union rejected this proposal and countered by proposing that this guarantee apply during the entire length of the three-year contract. The Employer rejected the idea.

Chapman claims that he realized that the parties were very close to an agreement on the plant seniority issue, but because of its importance to the Employer, he hoped to obtain the reinstatement of a Union representative, who had been discharged for leading an unauthorized slowdown, before he agreed to it. Therefore, Chapman claims that he approached Schick sometime after October 26, probably October 30 or 31, and stated that he was prepared to agree to the Employer's proposal on plant seniority if the Employer would agree to reinstate the employee. The Employer never got back to the Union on this point. There was no further discussion of the proposal, which was included in the Employer's October 30 and 31 overall written proposals but not in the Union's written proposals, either prior to the Employer's declaration of impasse on October 31 or the Company's unilateral implementation on November 29. However, as the parties had not resumed discussions on the Union's most recent oral proposal, and given the collective-bargaining reality that the Union was unlikely to yield on an issue of major concern to the Employer without some formal resolution of its oral proposal, we would not infer impasse from the fact that the Union's final written proposals did not address the plant seniority issue. In short, when the Employer declared impasse on October 31, the Union had a pending offer on the seniority proposal and the parties had moved from their original positions. See PRC Recording Co., supra.

Thus, we conclude that the parties were not at impasse at October 31. However, the Region should also argue that, in the alternative, assuming the parties were at impasse on October 31, impasse was broken by subsequent events. An impasse may be broken by a change of position, by continuous or further bargaining, by anything that creates a new possibility of fruitful discussion even if it does not create a likelihood of agreement including implied or explicit bargaining concessions. [55] Therefore, we would

[55] PRC Recording Co., 280 NLRB at 636, citations omitted.

argue that any alleged impasse was broken on November 13 when the Employer made a new bargaining proposal by letter by adding a new condition precedent to the payment of the lump sum bonuses (750 hours of work required for eligibility). Notwithstanding the Union's rejection of the Employer's new offer, the alleged impasse would also have been broken by the Union's offer to continue negotiations with the assistance of a federal mediator. Moreover, before adjourning the November 15 meeting, the parties agreed to continue negotiations on November 28-29. Accordingly, the parties were not at impasse when they reconvened on November 28.

To establish that the parties were not at impasse after November 28, we look first to the Union's revised proposal of that date that contained significant concessions. In Sacramento Union, [56], the Board found that because the union made a concession on a single major issue, and even though it was an issue other than that on which impasse was claimed, the Employer was precluded from declaring impasse.[57] In the instant case, the Union withdrew several major non-economic items, including subcontracting restrictions and four of its seven potroom proposals, and it reduced its wage and pension multiplier figures. Moreover, the Union's offer of an alternative to the MPB (the recapture of wages conceded in 1983) was a clear signal that it was ready to simply negotiate on money rather than insist on the retention of the MPB. Thus the Union made concessions on four major issues, two of which, the MPB and wages, the Employer claims were issues on which the parties had reached impasse. In addition, the Union opened the November 28th meeting by denying the Employer's contention that the parties were at impasse evidencing a lack of contemporaneous understanding. Accordingly, we conclude that the parties were not at impasse when negotiations adjourned on November 28.

3. Implementation of Final Offer pursuant to Bad Faith Bargaining and Premature Impasse.

While good-faith bargaining is a prerequisite to reaching bona fide impasse, if there is no impasse at all it is unnecessary to decide whether any alleged impasse was caused by bad-faith bargaining. If, on the other hand, an alleged impasse is the result of bad-faith bargaining, the

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[56] 291 NLRB 552, 556 (1988).

[57] The Board also took into consideration the bargaining history, the absence of any real bargaining on the impasse issue, and the lack of any contemporaneous understanding of impasse on the issue by the parties.

impasse will not be recognized for statutory purposes and the Board refuses to even pass on its legal existence.[58] Moreover, it is well settled that an employer violates its duty to bargain if it unilaterally institutes changes in existing terms and conditions of employment without first bargaining to impasse with the union. [59]

In the instant case, as noted above, we concluded that because the Employer failed to meet its Section 8(d) obligations to bargain in good faith, a lawful impasse was impossible. We have also concluded that the parties were never at impasse, even if we assume the parties bargained in good faith. Accordingly, we conclude further that the Employer violated Section 8(a)(5) by implementing its final offer on November 29.

4. Lawfulness of the Lockout and Replacement of Employees.

In Harter Equipment, [60] the Board held that an employer does not violate Section 8(a)(3) and (1), absent specific proof of antiunion motivation, by using temporary employees to engage in business operations during an otherwise lawful lockout, including a lockout initiated for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position. In formulating its decision, the Board in Harter found both an absence of antiunion motivation and an absence of evidence that the employer had engaged in bad-faith bargaining "before or after the lockout." On the other hand, in Association of D.C. Liquor Wholesalers,[61] the Board held that the lockout and replacement of employees were violative of Section 8(a)(5). Thus, the Board found that both the lockout and the replacement of employees occurred in support of the bad-faith effort to abort the bargaining process through the false claim of impasse. The Board further held that these measures constituted discrimination against unit employees in violation of Section 8(a)(3).

As in Association of D.C. Liquor Wholesalers, the lockout and replacement of employees in the instant case is unlawful. Here, the Employer, in addition to declaring impasse in bad faith, engaged in further unlawful conduct prior to the lockout by refusing to negotiate about manning and safety in the potrooms and by limiting negotiations on economics. Because the Employer engaged in bad faith

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[58] PRC Recording Co., 280 at 634 (citations omitted).
[59] NLRB v. Katz, 369 U.S. 736 (1962).
[60] Harter Equipment, Inc., 280 NLRB 597, 599 (1986).
[61] 292 NLRB No. 132, slip op. at 9-10.

bargaining prior to locking out its employees, the lockout was unlawful and violative of Section 8(a) (1), (3) and (5) of the Act.

5. *FOIA Exemption 5*

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